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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

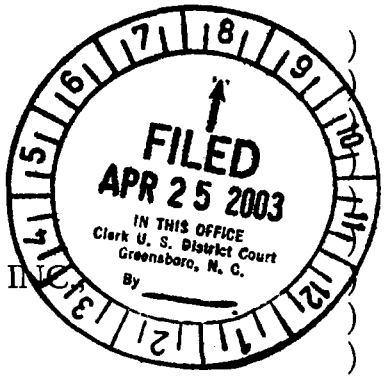
SPRINGWALL, INC.,

Plaintiff,

v.

TIMELESS BEDDING, INC.,

Defendant.



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MEMORANDUM OPINION

BEATY, District Judge.

I. INTRODUCTION

This matter is before the Court on Plaintiff Springwall, Inc.'s ("Plaintiff") Rule 59(e) Motion [Document #65], for an alteration or amendment to the Court's Order entered on May 21, 2002, which granted summary judgment in favor of Plaintiff. Also before the Court is Defendant Timeless Bedding Inc.'s ("Defendant") "Request for Extension of Time to Respond to Plaintiff's Rule 56 [sic] Motion" [Document #71], as well as Plaintiff's Motion for Sanctions [Document #72]. For the following reasons, both of Plaintiff's motions will be GRANTED and Defendant's request will be DENIED.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Court hereby adopts and incorporates the factual and procedural background set forth in its Memorandum Opinion filed on May 21, 2002 [Document #62], in which it delineated its reasons for granting summary judgment in favor of Plaintiff. Likewise the Court adopts and

incorporates all factual and legal conclusions reached in said Opinion. In its contemporaneously filed Order and Judgment [Document #63], the Court ordered Defendant Timeless Bedding, Inc. ("Defendant") to pay an amount of $92,554.54. This figure represented the amount of compensatory damages sought by Plaintiff as due under two licensing agreements it had with Defendant for royalties, the figure also included audit fees and the cost of certain items purchased by Defendant. Plaintiff now seeks to alter or amend the judgment to add an award of prejudgment interest[1] and to order the payment of accruing post-judgment interest.

As for Defendant's "Request for Extension of Time to Respond to Plaintiff's Rule 56 [sic] Motion," Defendant requests an unspecified amount of time in which to respond to Plaintiff's Rule 59(e) Motion. As support for this request, Defendant claims Defense counsel never received service of Plaintiff's Rule 59(e) Motion when it was originally filed on May 31, 2002.

Finally, regarding the Motion for Sanctions, Plaintiff requests that the Court sanction Defendant for filing its request for an extension of time in which to file a response to Plaintiff's Rule 59(e) Motion and, further, that the Court deny Defendant's request. Plaintiff argues the request was filed in an untimely manner and is groundless in that its assertions are inaccurate and, further, Plaintiff argues the request was not properly made under the applicable rules. Plaintiff asks that a potential sanction take the form of an Order requiring Defendant to pay attorney's fees of $915.00 and expenses of $29.00 incurred by Plaintiff in opposing Defendant's request for an extension of time and in seeking the sanctions themselves.

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[1] Plaintiff properly sought prejudgment interest in its Complaint and its Brief in Support of its Motion for Summary Judgment.

III. DISCUSSION

A. Plaintiff's Motion for Sanctions / Defendant's Request for Extension of Time

The Court will first discuss Plaintiff's Motion for Sanctions since it has bearing on the Rule 59(e) discussion. This is because the alleged basis for sanctions arises from Defendant's failure to timely respond to the Rule 59(e) Motion and Defendant's ensuing request for additional time to so respond and, more specifically, because of the fact that the Court has not yet ruled on this request for additional time.[2]

Plaintiff filed and served its Rule 59(e) Motion on May 31, 2002; subsequently, Defendant had twenty days to respond. Over a month after this twenty day deadline expired, Defendant filed a request for an extension of time in which to file its Response to the Rule 59(e) Motion. When a motion such as this, that is, one which seeks to extend the specified period within which a particular action must occur, is made after that specified period has expired, a court may only enlarge the period and "permit the act to be done where the failure to act was the result of excusable neglect . . . ." Fed. R. Civ. P. 6(b).

Here, the ability to file an untimely Response to Plaintiff's Rule 59(e) Motion is the act which Defendant seeks the Court's permission to be able to do. Accordingly, because Defendant's request to perform this act has come after the originally specified time for performing the act expired, Defendant must demonstrate that its untimeliness was the result of "excusable neglect." See Allison v. Eco Tech/Ram-Q Indus. Inc., No. 92-1056, No. 92-1126, 993

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[2] Contrary to the presumptive language in the first sentence of Defendant's Response, which presupposes a favorable ruling on Defendant's request for additional time in which to file such a Response.

F.2d 1535 (Table), 1993 WL 177804, at *3 (4th Cir. May 26, 1993) (Wiliams, J., dissenting) ("Defendants bore the burden of demonstrating excusable neglect for their failure to comply with the Rules of Civil Procedure.") As will be discussed below, the Court finds Defendant has failed to show excusable neglect and will therefore, in its discretion, deny Defendant's request for an extension of time in which to file its Response to Plaintiff's Rule 59(e) Motion. Accordingly, the Court will also strike the Response [Document #74] which was prematurely filed prior to the Court's ruling on this issue.[3]

The Supreme Court closely examined the concept of "excusable neglect" in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993). There the Court stated that "by empowering the courts to accept late filings 'where the failure to act was the result of excusable neglect,' . . . Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Pioneer Inv. Servs., 507 U.S. at 388, 113 S. Ct. at 1495 (interpreting language from Federal Rule of Bankruptcy Procedure 9006(b)(1), which contains relevant language patterned after Fed. R. Civ. P. 6(b)(1)). Significantly though, the Court specified later in the decision that "[a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." Id. at 392, 113 S. Ct. at 1496. Thus, the Court's purpose in listing possibilities such as "inadvertance, mistake, or carelessness" was to illustrate that, although such reasons would not

[3] It bears mentioning that the Court's action of striking this document does not unfairly prejudice Defendant. Even if not stricken, the arguments contained in the Response would not aid Defendant's position as they are meritless. Moreover, at no point during its entire nine-page length does the Response cite any authority, legal or otherwise, in support of any of its assertions.

ordinarily constitute excusable neglect, the concept should be flexible enough to encompass such possibilities and should not be given the limited reading, i.e. that only omissions caused by circumstances beyond the control of the movant should constitute excusable neglect, which the petitioner advocated. Id.

After making this point, the Pioneer Investment decision considered "what sorts of neglect will be considered 'excusable . . . .'" Id. at 395, 113 S. Ct. 1498. The Court concluded "that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," including "the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id.

Applying those factors to the present case and examining Defense counsel's actions equitably, the Court finds Defense counsel's neglect was not excusable. Defense counsel's primary contention in support of his failure to timely file a response to the Rule 59(e) Motion is that he never received service of Plaintiff's Rule 59(e) Motion when it was initially filed. (See Def.'s Req. for Extension of Time to Respond to Pl.'s Rule 56 [sic] Motion, at 1-2.) Defense counsel also claims that "[o]n July 30, 2002, [Plaintiff's] Attorney Beaver and I had our only discussion concerning the alleged filing of the Rule 59(E) [sic] Motion and Brief . . . ." (Def.'s Resp. to Pl.'s Mot. for Sanctions, at 1.) The Court finds these claims are not credible or, at a minimum, are not offered in good faith.

First,[4] Defense counsel makes a contention that, on July 10, 2002, Plaintiff's counsel

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[4] As a preliminary matter, it should be noted that "Defendant's Request for Extension of Time to Respond to Plaintiff's Rule 56 [sic] Motion" [Document #71] fails to take note of, or cite to, the applicable Rule of Civil Procedure and thus does not frame its arguments in terms of attempting to establish "excusable neglect." Nonetheless, in examining the Request, the Court will afford Defendant the benefit of construing all arguments as attempts to demonstrate

telephonically notified him that Plaintiff had filed a Rule 59(e) Motion and Brief in Support on May 11, 2002. Defendant's reference to the eleventh of May is either a clerical error, or it borders on incredulity because it is not likely that Plaintiff's counsel would have claimed to have filed a motion to alter/amend the judgment on a date *before* this Court had even entered judgment, which did not come until May 21, 2002.

More significant though is the date, July 10, 2002, on which Defense counsel claims to have received this telephonic notification from Plaintiff's counsel concerning the filing of the Rule 59(e) Motion. Contrary to the assertion contained in Defendant's Response to the Motion for Sanctions that the phone call on July 30, 2002 was the "only discussion" between Defense counsel and Plaintiff's counsel concerning the filing of the Rule 59(e) Motion, this date indicates Defense counsel was aware, at least as of July 10, 2002,[5] that Plaintiff had previously filed a Rule 59(e) Motion. Yet Defense counsel did not suggest to Plaintiff's counsel during the July 10, 2002 phone call, or at any time thereafter until the July 30, 2002 phone call, that he had not received service of the Rule 59(e) Motion or that he was previously unaware that such a motion had been filed. (See Opp'n to Timeless Bedding, Inc.'s Request for Extension of Time to Respond to Pl.'s Rule 56 [sic] Mot. and Br. in Supp. of Springwall's Mot. for Sanctions, Ex. 5, ¶¶ 4, 6 (hereinafter

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"excusable neglect."

[5] Plaintiff's counsel contends the phone call actually took place on July 8, 2002. In spite of this discrepancy, the overall significance is clear: Plaintiff's counsel called Defense counsel, on either July 8 or July 10, 2002, and discussed the Rule 59(e) Motion, which Plaintiff had previously filed on May 31, 2002. Defense counsel now claims he never received initial service of the Motion yet, inexplicably, Defense counsel made no mention of this significant issue during the July 8/10, 2002 phone call in which the attorneys discussed the very Motion Defense counsel claims he had yet to receive as of that date.

"Opp'n to Timeless Bedding, Inc.'s Req. for Extension of Time").) Likewise, Defense counsel failed to indicate to the Court that he allegedly had not been served with a copy of the Rule 59(e) Motion until July 31, 2002, the date on which Defendant's Request for Extension of Time was filed. Significantly though, attorneys have a "'*continuing duty to inform the Court* of any development *which may conceivably affect the outcome* of the litigation.'" United States v. Shaffer Equip. Co., 11 F.3d 450, 458 (4th Cir. 1993) (quoting Tiverton Bd. of License Comm'rs. v. Pastore, 469 U.S. 238, 240, 105 S. Ct. 685, 686, 83 L.Ed.2d 618 (1985)) (emphasis supplied by Shaffer court).

Additionally, after the phone call Defense counsel had with Plaintiff's counsel in early July, Defense counsel received further notice, in written form, that a Rule 59(e) Motion had been filed on May 31, 2002. Defendant had earlier filed Notice of Appeal with the Fourth Circuit. Because the pendency of the Rule 59(e) Motion effectively kept this Court's judgment from being final, Plaintiff's counsel wrote to the Fourth Circuit to request a stay of the appeal pending this Court's decision on the Rule 59(e) Motion. Plaintiff's letter to the court of appeals was dated July 10, 2002 and included a statement that "[o]n May 31, 2002, I filed . . . a Rule 59(e) Motion asking the [District] Court to amend the Judgment to include prejudgment interest." (Opp'n to Timeless Bedding, Inc.'s Req. for Extension of Time, Ex. 2.) This letter was carbon copied to Defense counsel. (See Id.) Further, the Clerk of Court for the Fourth Circuit promptly responded to counsel for Plaintiff and counsel for Defendant with a letter, also dated July 10, 2002. (Opp'n to Timeless Bedding, Inc.'s Req. for Extension of Time, Ex. 3.) Similar to Plaintiff's letter, this letter from the court of appeals "note[s] that a timely post-judgment motion

is pending with the district court" then notifies the parties that the Clerk has docketed the appeal but will not proceed until the post-judgment motion has been disposed of by this Court. (Id.) Thus, there is further evidence that, as of July 10, 2002, Defense counsel was well aware that a Rule 59(e) Motion had been filed on May 31, 2002, yet Defense counsel raised no contention at that time that he had not received service of the Motion.

Beyond the demonstrable lack of good faith and lack of a showing of excusable neglect on Defense counsel's part in delaying his request for an extension of time until July 31, 2002, Defendant's "Request for Extension of Time to Respond to Plaintiff's Rule 56[sic] Motion" [Document #71] also does not comply with the Local Rules of this District. Local Rule 7.3(a), which is entitled "Form," states that "[a]ll motions, unless made during a hearing or at trial, shall be in writing and shall be accompanied by a brief except as provided in section [(j)] of this rule." Defendant's Motion is not accompanied by a brief, and it is not of a type excepted from the brief requirement by section (j). Furthermore, Local Rule 7.3(b), entitled "Content," states that "[a]ll motions shall state with particularity the grounds therefor, shall cite any statute or rule of procedure relied upon, and shall set forth the relief or order sought." Defendant's Motion does not cite any statute or rule of procedure and, moreover, fails to cite any legal authority at all. Additionally, the Motion fails to set forth the relief or order sought. That is, it requests an extension of time but does not state how long of an extension is requested.

Finally, the Court is also guided in exercising its discretion to disallow Defendant's request to file an untimely Response by similar past incidents in this case. Defense counsel has repeatedly ignored this Court's filing deadlines and attempted to file documents well past their applicable

deadlines and made groundless requests for extensions of time. (See Pl.'s Reply Br. in Supp. of Mot. for Sanctions, at 1-2; Order dated November 29, 2001 [Document #50] finding no good cause for extension of time.)

Therefore, when reviewing Defense counsel's actions in light of the equitable factors set forth in Pioneer Investment, particularly counsel's demonstrable absence of good faith, the Court finds Defense counsel's neglect in failing to timely respond to Plaintiff's Rule 59(e) Motion is not excusable. Accordingly, Defendant's "Request for Extension of Time to Respond to Plaintiff's Rule 56 [sic] Motion" [Document #71] is DENIED and Defendant's "Response to Plaintiff's Rule 59(E) [sic] Motion" [Document #74] is hereby STRICKEN from the record. Further, the Court finds this conduct is part of an unacceptable pattern on the part of Defense counsel that, in this instance, would warrant an award of attorney fees as a sanction. Therefore, by virtue of its power under 28 U.S.C. § 1927 to take action against "unreasonably and vexatiously" multiplying the proceedings in a case, also by virtue of its inherent power to impose "compliance with lawful mandates," Shaffer Equip., 11 F.3d at 461, and pursuant to Local Rule 83.4(a)(4) for failure to comply with other local rules, the Court will exercise its discretion to GRANT Plaintiff's Motion for Sanctions [Document #72] against Defendant.[6] The sum of $944.00, representing attorney's

[6] The Court is hesitant to levy the sanctions against Defendant rather than directly against Defendant's sole Counsel of record, Mark Floyd Reynolds II, as it seems inappropriate to penalize Defendant for the omissions and unacceptable conduct of its attorney. Likewise, 28 U.S.C. § 1927 seems directed at the culpable attorney rather than the litigant. Nevertheless, when it comes to the subject of excusable neglect, the Supreme Court has spoken directly to the issue stating that "in determining whether respondents' failure to file their proofs of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable." Pioneer Investment, 507 U.S. at 397, 113 S. Ct. at 1499 (emphasis in original). The Court made it clear that litigants are to "be held accountable for the acts and omissions of their chosen counsel." Id.

fees of $915.00 and expenses of $29.00, is due and payable to Plaintiff at this time.

B. Motion to Alter/Amend Judgment

In its entirety, Rule 59(e) reads simply: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). In terms of using Rule 59(e) as a vehicle for modification to add prejudgment interest, the Supreme Court has concluded that "a postjudgment motion for discretionary prejudgment interest involves the kind of reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply." Osterneck v. Ernst & Whinney, 489 U.S. 169, 176, 109 S. Ct. 987, 992, 103 L.Ed.2d 146 (1989). To that end, "[i]n deciding if and how much prejudgment interest should be granted, a district court must examine--or in the case of a postjudgment motion, reexamine--matters encompassed within the merits of the underlying action." Id. at 176, 109 S. Ct. at 991. Thus, Plaintiff's Motion, which was filed within ten days of the Court's entry of summary judgment and seeks an award of prejudgment interest and an order directing that Defendant be responsible for accruing postjudgment interest, is properly made under Rule 59(e).

Now, as the Osterneck decision indicates, the Court must reexamine matters encompassed within the merits of the underlying action to determine whether to award prejudgment interest and, if so, in what amount. As mentioned above and explained in the Court's previous summary judgment opinion, there are two licensing agreements at issue, one is known as the "Chiropractic Agreement," and the other, the "Springwall Agreement."[7] Per the express language of the agreements themselves, the Chiropractic Agreement is to be construed under the laws of Ohio

[7] Apart from these two licensing agreements, there were also breaches of contract for the purchase of merchandise. The issues of whether to award prejudgment interest for the damages arising from those breaches and, if so how much, will be discussed *infra*.

while the Springwall Agreement is subject to the laws of Minnesota. Nonetheless, choice of law determinations are to be made on an issue-by-issue, and not case-by-case, basis. See Restatement (Second) of Conflict of Laws § 2 comment a(3) (1971) (Describing state choice of law rules as "methods and rules for determining whether *particular issues* in a suit involving foreign elements should be determined by its own local law rules or by those of another state." (emphasis supplied)). Therefore, the fact that this Court previously followed Ohio and Minnesota substantive laws in determining the substantive rights of recovery in this case does not in itself resolve the choice of law issue concerning prejudgment interest.

A similar issue regarding choice of law concerning prejudgment interest was addressed in Thornhill v. Donnkenny, Inc., 823 F.2d 782, 787 (4th Cir. 1987). In that case Virginia substantive law, including Virginia's conflicts of law rules, governed. Thornhill, 823 F.2d at 787. The Fourth Circuit observed that Virginia conflicts of law rules generally honor parties' contractual choice of law provisions and therefore the parties' contractual provisions, in which they chose to be governed by New York law, were enforceable in Virginia. Id. Significant to the present case, the court then found that "if New York substantive law governs the breach of contract claim by virtue of Virginia's conflicts of law rules, we believe that Virginia would follow New York substantive law on the issue of prejudgment interest as well." Id.

In the instant matter North Carolina substantive law, including conflict of law rules, applies. North Carolina courts generally heed contractual choice of law provisions, unless the action is one that does not specifically arise out of the contract. See Johnston County, N.C. v. R.N. Rouse & Co., Inc., 331 N.C. 88, 92-93, 414 S.E.2d 30, 33 (1992) (Discussing three types of contractual provisions --choice of law, consent to jurisdiction, and forum selection-- that parties have historically used to endeavor to avoid potential litigation concerning judicial jurisdiction and governing law); Robinson v. Ladd, 995 F.2d 1064 (Table), 1993 WL 211309, **5 (4th Cir. June

14, 1993) ("North Carolina federal district courts have . . . rejected the application of contractual choice of law provisions to any actions which do not specifically arise out of the contract."). Thus, it appears that, like Virginia in the Thornhill opinion, North Carolina choice of law would follow the substantive law chosen by the parties' contractual provisions on the issue of prejudgment interest. Therefore, the Court will apply the laws of Ohio and Minnesota, as is appropriate for the particular contract in dispute, to determine if the damages awarded under each of the contracts merit an award of prejudgment interest. This decision is also in keeping with the United States Supreme Court's guidance that "[e]xcept as forbidden by some public policy,[8] the tendency of the law is to apply in contract matters the law which the parties intended to apply." Lauritzen v. Larsen, 345 U.S. 571, 588-89, 73 S. Ct. 921, 931, 97 L.Ed. 1254 (1953).

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[8] With regard to the Springwall agreement, a public policy argument could possibly be raised based on the Minnesota Court of Appeals decision in Zaretsky v. Molecular Biosystems, Inc., 464 N.W.2d 546 (Minn. App. 1990). There the court rejected the "majority view among the states [which] has been that prejudgment interest, like the issue of damages, is substantive, and the state whose laws govern the substantive legal questions also governs the question of prejudgment interest." Zaretsky, 464 N.W.2d at 549. The court also rejected the similar Restatement (Second) of Conflict of Law view, which "supports the majority view that prejudgment interest involves a matter of substantive law." Id. Nonetheless, this Court does not view the mere fact that North Carolina law appears to *differ* from Minnesota law on this issue as an indication that a decision to follow North Carolina law would be contrary to the *public policy* of Minnesota. As the North Carolina Supreme Court has explained:

> the mere fact that the law of the forum differs from that of the other jurisdiction does not mean that the foreign statute is contrary to the public policy of the forum. To render foreign law unenforceable as contrary to public policy, it must violate some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum state. This public policy exception has generally been applied in cases such as those involving prohibited marriages, wagers, lotteries, racing, gaming, and the sale of liquor.

Boudreau v. Baughman, 322 N.C. 331, 342, 368 S.E.2d 849, 857-58 (1988) (citations omitted). While the situation in Boudreau was the inverse of the present case, the explanation of what is meant by "public policy" in this context remains applicable. No such grave contravention of Minnesota public policy will result from the Court's decision to view the issue of prejudgment interest as a substantive one which, per the parties' choice of law expressed in the Springwall agreement, is to be governed by the laws Minnesota.

1. The Chiropractic Agreement

As mentioned, the terms of the Chiropractic Agreement provide that it is to be governed by and construed under the law of Ohio. (See Pl.'s Br. in Supp. of Rule 59(e) Motion, at 6.) In relevant portion, § 1343.03(A) of the Ohio Revised Code states that "[i]n cases . . . when money becomes due and payable upon any bond, bill, note, or other instrument of writing . . . the creditor is entitled to interest at the rate of ten per cent per annum . . . ." The Chiropractic Agreement is an "other instrument of writing" thus, pursuant to Ohio statutory law, Plaintiff is entitled to 10% APR interest on all amounts due under the Chiropractic Agreement from the time they became due and payable.

Under Ohio law, "[a]n award of prejudgment interest is committed to the trial court's discretion . . . ." Preferred RX, Inc. v. Am. Prescription Plan, Inc., 46 F.3d 535, 551 (6th Cir. 1995). In exercising this discretion a court is to consider how aggressively a plaintiff pursued settlement, as well as "whether the defendant has failed to make a good faith effort to settle." Id. A party has not failed to make a good faith effort to settle if he has "(1) fully cooperated in discovery proceedings; (2) rationally evaluated his risks and potential liability; (3) not attempted to unnecessarily delay any of the proceedings; and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party." Id.

Turning first to whether Defendant made a good faith effort to settle, the record amply demonstrates that, in light of any one of the factors listed in Preferred RX, it did not. The examples of Defendant's lack of good faith to settle are as follows: Defendant failed to cooperate in discovery and was sanctioned for its discovery abuses; provided irrational arguments as to why it did not have to pay the royalties due and attempted to escape liability through abusive litigation tactics; delayed the resolution of this case from its initially scheduled trial date in January 2002 by failing to cooperate in discovery; and did not attempt to peaceably resolve the matter either

before the lawsuit was filed or during the course of litigation by engaging in settlement discussions. (See Memorandum Opinion filed May 21, 2002 [Document #62]; Pl.'s Mot. for Exemption From Mediated Settlement Conference [Document #17].) As for whether Plaintiff aggressively pursued settlement, Plaintiff sought settlement with as much vigor as could be expected given Defendant's disruptive litigation tactics. Ultimately however, the case was exempted from the Court's usual mediated settlement conference procedures for good cause pursuant to Local Rule 16.4(c). (See Minute Entry [Dated August 13, 2001] granting Pl.'s Mot. for Exemption From Mediated Settlement Conference.) Accordingly, the Court, in its discretion, will award prejudgment interest to Plaintiff for amounts which were due and payable under the Chiropractic Agreement.

There were three such amounts which include: 1) 1996 royalties of $8,790.25, which were awarded as part of the Court's previous Order granting summary judgment and, per the terms of the Chiropractic Agreement, were overdue no later than April 1, 1997; 2) 1997 royalties of $22,121.25, also awarded in the previous Order and which, also per the contract, were overdue no later than February 16, 1998; and 3) audit costs. Using a 10% APR to calculate the 1996 royalties due for the relevant portion of 1997 as well as the continually-outstanding 1996 royalties during the full years of 1998 through May 21, 2002 when summary judgment was granted, the total of prejudgment interest due for the 1996 royalties would be $4,623.96. Using a 10% APR to calculate the 1997 royalties due for the relevant portion of 1998 as well as the continually-outstanding 1997 royalties during the full years of 1999 through May 21, 2002 when summary judgment was granted, the total of prejudgment interest due for the 1997 royalties would be $9,424.33. As for the audit costs, they were due on demand which was first made by letter dated December 18, 1997. The Court finds Defendant owes prejudgment interest on these costs as well at 10% APR from December 21, 1997, a date which Plaintiff suggests to account for mail delivery time of the December 18 demand letter, until May 21, 2002 for a total of $2,044.20. Accordingly, the collective total of prejudgment interest now due for amounts previously awarded by the

Court as damages under the Chiropractic Agreement is $16,092.49.

2. The Springwall Agreement

As discussed, the terms of the Springwall Agreement provide that it is to be governed by and construed under the laws of Minnesota. (See Pl.'s Br. in Supp. of Rule 59(e) Motion, at 9.) Minnesota allows prejudgment interest in more than one way. Trapp v. Hancuh, 587 N.W.2d 61, 63 (Minn. App. 1998) ("In Minnesota, both statute and common law govern the award of prejudgment interest."). First, a Minnesota statute allows "preverdict" interest "from the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim [provided the action is commenced within two years of a written notice of claim for interest], whichever occurs first . . . ." Minn. Stat. Ann., § 549.09(1)(b). Second, section 549.09(1)(b) contains a carve-out provision that states the statute applies "[e]xcept as otherwise . . . allowed by law . . . ." Id. To that end, Minnesota common law allows "prejudgment interest [to] begin[] to run on a liquidated and on a readily ascertainable unliquidated claim when it arises." Trapp, 587 N.W.2d at 63; see also Baufield v. Safelite Glass Corp., 831 F.Supp. 713, 719 (D. Minn. 1993). Thus the statutory exception, by deferring to the common law, is significant in that it allows for conceivably greater awards because the calculation of prejudgment interest may potentially begin to run much earlier than under the statutory provision. This common law doctrine allowing prejudgment interest from the time the claim arises "is appropriate when the amount demanded can be ascertained by computation or reference to generally recognized standards and does not depend on a contingency." Trapp, 587 N.W.2d at 64. For instance, in Trapp the court did not compute prejudgment interest from the time the claim arose but rather used "the commencement of the litigation as the starting date" because the plaintiff's partnership interest was not readily ascertainable. Id. However, in Baufield the plaintiff was awarded

prejudgment interest on lost wages, as they were readily ascertainable by computation. Baufield, 831 F.Supp. at 719.

In the case at bar, the damages from the Springwall Agreement are readily ascertainable from contract formulas and the data provided by Defendant's President. Moreover, the amounts have already been computed as outlined in the Court's Memorandum Opinion filed contemporaneously with the May 21, 2002 Order granting summary judgment. The royalty amounts are $17,223.58 under the Springwall Agreement for 1996, and $23,701.60 under the Springwall Agreement for 1997. The Court therefore finds that prejudgment interest is appropriate from the time Plaintiff's claim arose, namely, when Defendant breached the Springwall Agreement.

Minnesota Statute § 549.09(c) explains the procedure used for computing the applicable interest rate and declares that "[t]he state court administrator shall communicate the interest rates to the court administrators and sheriffs for use in computing the interest on verdicts and shall make the interest rates available to arbitrators." Running from April 1, 1997 to May 21, 2002, and using the interest rates published by the State Court Administrator for Minnesota for that time span,[9] the prejudgment interest on 1996 royalties due under the Springwall Agreement is $4226.66[10] and, on 1997 royalties due, is $4822.09.[11] Thus, the Court finds the total Springwall

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[9] The interest rates are as follows: 1997, 5%; 1998, 5%; 1999, 4%; 2000, 5%; 2001, 6%; 2002, 2%. (See Pl.'s Br. in Supp. of Rule 59(e) Motion, Ex. A.)

[10] There are various minor clerical errors in the calculations Plaintiff provided to the Court in its Brief in Support of its Rule 59(e) Motion. Where the Court has found such errors, it will make note of them and use the correct figures. Here, Plaintiff miscalculated the prejudgment interest due on 1996 Springwall royalties for the years 1997, 2001 and 2002; the correct prejudgment interest figures for those years are, respectively, $649.33, $1033.41, and $132.62. With these clerical changes, the corrected total prejudgment interest due for all the 1996

Agreement royalties prejudgment interest due is $9,048.75.[12]

3. Unpaid Balance Owed for Merchandise Purchased by Defendant

In 1998, at least up to the termination of the previously discussed Licensing Agreements, Defendant purchased various goods and services from Plaintiff. The various invoices for these goods and services constituted contracts between Plaintiff and Defendant. Defendant breached these contracts by failing to pay a total balance owed of $16,086.38. (See Memorandum Opinion of May 21, 2002, at 19-20 [Document #62].) As to the issue of prejudgment interest on this damage figure, there is some question as to whether the governing law should derive from North Carolina, where Defendant is located and conducts business, or the law of New Brunswick, Canada, where Plaintiff is located. For the reasons that follow, the Court will apply North Carolina law to determine if prejudgment interest should be awarded for the damages arising from the breaches of contract.

At first glance there appears to be some support for applying the law of New Brunswick, Canada. Under North Carolina law, "a contract is made in the place where the last act necessary to make it binding occurred." Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 365, 348 S.E.2d 782, 785 (1986). In this case, the "last act" was the acceptance by Plaintiff of Defendant's

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Springwall Agreement royalties is $4226.66.

[11] Here, to correct the figures supplied in Plaintiff's Brief, the prejudgment interest on the 1997 Springwall royalties for the years 1998 and 2002 should be $1084.35 and $182.50, respectively. With these clerical changes, the corrected total prejudgment interest due for all the 1997 Springwall Agreement royalties is $4822.09.

[12] The total Springwall Agreement royalties prejudgment interest figure of $9,048.75 is the sum of $4226.66 and $4822.09, which are the corrected prejudgment interest amounts for the 1996 and 1997 royalties.

offer to contract by accepting the order in New Brunswick. Thus, the contract was "made" in New Brunswick.

However, Federal Rule of Civil Procedure 44.1 requires parties to give written notice, in the pleadings or otherwise, of their intention to assert foreign law. Fed. R. Civ. P. 44.1; see also Clarkson Co. Ltd. v. Shaheen, 660 F.2d 506, 512 n.4 (2d Cir. 1981), cert. denied, 455 U.S. 990, 102 S. Ct. 1614, 71 L.Ed.2d 850 (1982). Here, none of the parties to the contract claimed the applicability of Canadian law or now assert that it differs from the law of North Carolina.[13] Indeed, up to this point both parties have been silent regarding the application of foreign law and, certainly, neither party has proven to a reasonable degree the substance of any potentially applicable foreign principles of law. Thus, it is generally appropriate to apply the law of the local forum. See Carey v. Bahama Cruise Lines, 864 F.2d 201, 205-06 (1st Cir. 1988) (where parties are silent regarding application of foreign law, court should apply the law of the forum if the forum state bears a reasonable relationship to the dispute and the parties are not attempting to escape a foreign sovereign's policy interests); Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1006 (5th Cir. 1990) ("If the Bank wanted to rely on Abu Dhabi law, it was obligated to present to the district court clear proof of the relevant Abu Dhabi legal principles."); Restatement (Second) of Conflicts of Laws § 136, comment h (1971) ("[W]here either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law .... The forum will usually apply its own local law for the reason that in this way it can best do justice to the parties .... When both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum ...."); Commercial Ins. Co. of Newark, NJ v. Pacific-

[13] Indeed, Plaintiff asserts that "[e]ven if the Court applied the law of New Brunswick, Canada, the result would apparently be about the same as that law also provides for prejudgment interest 'between the date when the cause of action arose and the date of judgment.'" (Pl.'s Br. in Supp. of Rule 59(e) Motion, at 13 (quoting R.S.N.B. § 45).)

Peru Constr. Corp., 558 F.2d 948, 952 (9th Cir. 1977) (same).

Accordingly, the parties' failure to meet the requirements of Fed. R. Civ. P. 44.1, silence regarding the application of foreign law, and failure to prove to a reasonable certainty the substance of Canadian principles of law will be taken as an acquiescence to the application of the local law of the forum state, that is, the state of North Carolina. Further, the forum state certainly bears a reasonable relationship to the dispute in that Defendant ordered, received, and used the merchandise in North Carolina, Defendant was billed in North Carolina, and Defendant spent money from North Carolina for partial payment of the invoices. Finally, there is no indication that the parties are attempting to escape Canada's policy interests by seeking application of local forum law. Consequently, the Court finds it is appropriate to apply the law of North Carolina.

North Carolina provides for prejudgment interest on breach of contract damages as follows:

> In an action for breach of contract . . . the amount awarded on the contract bears interest from the date of breach . . . . If the parties have agreed in the contract that the contract rate shall apply after judgment, then interest on an award in a contract action shall be at the contract rate after judgment; otherwise it shall be at the legal rate.

N.C.G.S. § 24-5(a). Here, there was no agreement in the contracts as to what rate might apply after a judgment, therefore the applicable rate is the legal rate which is set by N.C.G.S. § 24-1 at eight percent per annum.

The last account entry for the unpaid invoices is dated May 12, 1998. (Pl.'s Br. in Supp. of Rule 59(e) Mot., at 13.) The invoices provide that they are due and payable within 30 days. (Id.) Plaintiff has consented to use of the date 30 days after the last of the ledger account entries

for the merchandise orders, that is, June 11, 1998, for the time on which an award of prejudgment interest would begin to run on the total amount of $16,086.38 due. In so doing, Plaintiff waives any prejudgment interest which might otherwise be owed on any of the ordered merchandise for which payment was due before May 12, 1998. Accordingly, the Court finds Defendant owes prejudgment interest on the entire $16,086.38 balance at 8% APR from June 11, 1998 to May 21, 2002 for a total of $5,073.64[14] in prejudgment interest.

4. Postjudgment Interest

As a final matter, Plaintiff also requests that the Court add to the Order a specific provision for postjudgment interest. As this was a diversity action resulting in a money judgment recovered in a federal district court, it is apparent that Plaintiff is entitled to postjudgment interest. 28 U.S.C. § 1961(a) ("Interest shall be allowed on any money judgment in a civil case recovered in a district court."); Forest Sales Corp. v. Bedingfield, 881 F.2d 111, 113 (4th Cir. 1989) ("As a matter of statutory interpretation of the plain language of the text, the legislative history, and the policy expressed in the statute, we adhere to the strong precedent established in other circuits for allowing § 1961 to govern diversity actions. In these cases postjudgment interest should be calculated at the federal, rather than state, rate."). There is no requirement that the Court specifically provide for postjudgment interest in the final judgment, as most courts have interpreted it as being automatically allowed. See In re Kemp, 242 B.R. 178, 183 (8th Cir. BAP 1999) ("[C]ourts which have construed statutes providing for mandatory post judgment interest conclude that money judgments recovered in civil cases automatically bear interest from the date

[14] Here, to correct the figures supplied in Plaintiff's Brief, the prejudgment interest for 1998 and 2002 on the unpaid balance owed should be $715.84 and $497.07, respectively. With these clerical changes, the corrected total of prejudgment interest owed on the unpaid balance invoices is $5073.64.

of entry of the judgment, regardless of whether the judgment itself awards interest."); Christian v. Joseph, 15 F.3d 296, 298 (3d Cir. 1994) ("28 U.S.C.A. § 1961(a) does not specifically provide for automatic accrual of post-judgment interest, yet it has been uniformly interpreted to do so, regardless of whether the district court order provided for post-judgment interest payments."). Nonetheless, the Court in this instance specifically finds that awarding postjudgment interest is appropriate and will therefore add a provision to the Order and Judgment requiring that Defendant be responsible for postjudgment interest as mandated by 28 U.S.C. § 1961(a).

As detailed in the previous sections, the prejudgment interest in this case is as follows: Chiropractic Agreement royalties interest of $16,092.49 (including Audit Cost interest of $2,044.20); Springwall Agreement royalties interest of $9,048.75; unpaid invoice balance interest of $5,073.64. Thus the total of prejudgment interest due is $30,214.88[15] which, in addition to the $92,554.54 in damages the Court has already awarded, yields a grand total of $122,769.42[16] in damages. Postjudgment interest is required to be paid on that entire amount. See Hartford Acc. & Indem. Co. v. U.S. Fire Ins. Co., 710 F.Supp. 164, 167 (E.D.N.C. 1989), aff'd, 918 F.2d 955 (4th Cir. 1990) ("[T]he award of pre-judgment interest in this case is clearly an element of damages."). Using the appropriate interest rate for May 21, 2002, which is 2.4% APR, and calculating pursuant to the formula provided by 28 U.S.C. § 1961(a), the daily interest accumulating is 2.4% multiplied by the judgment amount of $122,769.42 and then divided by 365 days, which equals $8.07 per day.

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[15] This figure accounts for the aforementioned clerical corrections made to the prejudgment interest figure for the total Springwall Agreement royalties ($9048.75, corrected total) and the clerical corrections made to the prejudgment interest figure for the unpaid balances ($5073.64, corrected total).

[16] This grand total reflects the clerical corrections made to the total prejudgment interest figure ($30,214.88, corrected figure).

IV. CONCLUSION

For all of the foregoing reasons, the Court will DENY Defendant's "Request for Extension of Time to Respond to Plaintiff's Rule 56 [sic] Motion" [Document #71] and Defendant's "Response to Plaintiff's Rule 59(E) [sic] Motion" [Document #74] is hereby STRICKEN from the record. Further, the Court has found that an unacceptable pattern of conduct has, in this instance, caused Plaintiff to unnecessarily incur costs in the amount of $944.00. The Court will therefore GRANT Plaintiff's Motion for Sanctions [Document #72] against Defendant in the amount of $944.00, representing attorney's fees of $915.00 and expenses of $29.00.

Also for the foregoing reasons, the Court will GRANT Plaintiff's Rule 59(e) Motion [Document #65] to amend the Order and Judgment previously entered by the Court in this case on May 21, 2002. Prejudgment interest shall be added as follows: Chiropractic Agreement royalties interest of $16,092.49 (including Audit Cost interest of $2,044.20); Springwall Agreement royalties interest of $9,048.75; unpaid invoice balance interest of $5,073.64. The total of prejudgment interest due is $30,214.88 which, in addition to the $92,554.54 in damages the Court has already awarded, yields a grand total of $122,769.42 in damages. Finally, postjudgment interest is payable, pursuant to 28 U.S.C. 1961(a), on the total damage award at a rate of $8.07 per day. Such postjudgment interest began to accumulate on May 21, 2002, the day judgment was originally entered, and shall continue to accrue at $8.07 per day until the entire Judgment award (as revised by the addition of prejudgment interest described herein) is paid in full.

An Amended Order and Judgment consistent with this Memorandum Opinion will be

filed contemporaneously herewith.

This, the 25th day of April, 2003.

United States District Judge